THE ENVIRONMENTAL LAW DIVISION BULLETIN

January 1997 Volume 4, Number 4

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

Civil Penalties to be Increased Ten Percent - CPT Anders

On 31 December 1996, the U.S. Environmental Protection Agency (USEPA) issued a Civil Monetary Penalty Inflation Adjustment Rule (IAR), the first of USEPA's periodic inflation adjustments to its civil monetary penalty policies. Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (1996) (to be codified at 40 C.F.R. pt. 19.4). The purpose of the IAR, as mandated by the Debt Collection Improvement Act of 1996, is to assure that the penalty policies keep pace with inflation and thereby maintain the deterrent effect that Congress intended when it originally specified penalties. Debt Collection Improvement Act of 1990, Pub. L. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. §2461); *as amended by* the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321 (1996)(codified at 31 U.S.C. §3701).

The IAR, which will take effect 30 January 1997, will increase almost all penalty provisions within the major environmental statutes by ten percent (with the exception of the new penalty provisions added by the 1996 amendments to the Safe Drinking Water Act). For example, the new statutory maximum penalties for civil, judicial, or administrative proceedings for RCRA will be $27,500, an increase from $25,000, as of 30 January 1997. The USEPA will review its penalties at least once every four years and will adjust them as necessary for inflation according to a specified formula.

DID YOU KNOW? . . . THE SEVEN TON KILLER WHALE CAN REACH SWIMMING SPEEDS OF 50 MILES PER HOUR.

Candidate Species Final Decision - MAJ Ayres

On 5 December 1996, the U.S. Fish and Wildlife Service (USFWS) announced a final decision to discontinue the practice of maintaining a list of species regarded as "category 2 candidates." Endangered and Threatened Wildlife and Plants; Notice of Final Decision on Identification of Candidates for Listing as Endangered or Threatened, 61 Fed. Reg. 64,481-485 (1996) (to be codified at 50 C.F.R. pt. 17). The summary of the Notice states in part:

> Future lists of species that are candidates for listing under the Endangered Species Act (Act) [16 U.S.C. §1531-1544 (1988)] will be restricted to those species for which the Service [USFWS] has on file sufficient information to support issuance of a proposed listing rule. A variety of other lists describe "species of concern" or "species in decline" and the Service believes that these lists are more appropriate for use in land management planning and natural resource conservation efforts that extend beyond the mandates of the Act.

Army Regulation 200-3 requires installations to consider candidate species in making decisions that may affect those species. DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES - LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-4(a) (28 Feb. 1995). Previously, the USFWS

categorized candidate species as Categories 1, 2, or 3 with the result that approximately 1400 species were considered candidate species. In past practice, Category 1 candidates consisted of (1) proposed species, and (2) species for which the USFWS had sufficient information on file to support issuance of a proposed rule.

Present practice is to term these species simply (1) proposed species, and (2) candidate species. Also in the past, Category 2 candidates were those species for which the USFWS had information on file to suggest that listing action was possibly appropriate. Under this final decision, the USFWS is discontinuing the designation of these species as Category 2 species and does not regard these species as candidates. 61 Fed. Reg. at 64,481. The USFWS also clarified previously that Category 3 species, species that were once considered for listing but are no longer under such consideration, are not to be considered candidates for listing. Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 Fed. Reg. at 7596-7613 (1996) (to be codified at 50 C.F.R. pt. 17).

Overseas Environmental Compliance - MAJ Ayres

Although signed in April of 1996, the Department of Defense (DoD) only recently released Department of Defense Instruction (DoDI) 4715.5, "Management of Environmental Compliance at Overseas Installations," April 22, 1996. This DoDI replaces DoD Directive 6050.16, "DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations," September 20, 1991, that was cancelled by DoD Directive 4715.1, "Environmental Security," February 24, 1996.

DoDI 4715.5 sets guidelines for compliance to environmental standards at U.S. installations overseas. Like its predecessor, DoDI 4715.5 requires DoD Components to establish and comply with Final Governing Standards (FGS) to protect human health and the environment for each foreign country where the Department of Defense maintains substantial installations. The Instruction also requires the continued maintenance of the Overseas Environmental Baseline Guidance Document (OEBGD) as a set of objective criteria and management practices developed to protect human health and the environment for use in foreign nations where no FGS has been established. The OEBGD is generally based upon environmental standards applicable to DoD installations, facilities, and actions within the United States. The FGS is a comprehensive set of country-specific substantive provisions, typically specific management practices or technical limitations on effluent, discharges, etc. The FGS is promulgated by the designated DoD Environmental Executive Agent and is determined by applying the stricter of applicable host-nation environmental standards, standards under applicable international agreements (e.g. Status of Forces Agreements), or standards within the OEBGD. ELSs desiring a copy of DoDI 4715.5 or the OEBGD, please contact me via electronic mail at ayrestho@otjag.army.mil.

DID YOU KNOW? . . . FARMERS USE APPROXIMATELY 1/10
OF THE PESTICIDES PER ACRE THAT PRIVATE HOMEOWNERS USE.

Legislative Update - CPT DeRoma

Look for heightened congressional focus on reform of the Clean Water Act (CWA), 33 U.S.C. §§1251-1387 (1990), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k (1988), in the 105th Congress.

In the RCRA arena, the focus is likely to be on reform of the corrective action program, and will evolve from legislation introduced in the Senate during the last session. S. 1274, 104th

Cong., 1st Sess. (1996). Opposition to the reforms is expected from environmental groups. Because of increased dialog among environmental groups, industry, the U.S. Environmental Protection Agency (USEPA), and Congress, however, this legislation could have a strong chance of passing in the next session if negotiations are successful. The fact that the RCRA reforms will not be included as part of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Reauthoriztion, which will be a separate focus for reform, will increase the chances of successful legislation in this area. CERCLA, 42 U.S.C. §9601-9674 (1994). Of significance in the version proposed in the 104th Congress is the provision that if cleanup wastes are managed under a state or USEPA approved cleanup plan, then they will be exempted from the hazardous waste management requirements of RCRA Subtitle C.

Similarly, the CWA is expected to be a priority in the 105th Congress. Where RCRA reform is likely to build on previous legislation, CWA reform will depart from earlier, much criticized, legislative reform efforts in 1995. Highlighted areas for reform to date include pollutant trading and wetlands mitigation. Although no mention has been made of expanding the federal waiver of sovereign immunity under the CWA, reform efforts will build on the compromise that led to the Safe Drinking Water Amendments of 1996. If so, a similar broadening of the waiver of sovereign immunity could be likely. Such an expansion would have great impact on federal installations due to the fact that Federal entities currently are exempt from paying fines and penalties under the present CWA.

Regardless of what factors will facilitate compromise, legislation implementing reforms probably won't be enacted until late in the session. Any reforms that appear to be imminent will be synopsized in this Bulletin, and the legislation itself will be loaded to the Environmental Law Files Area on the Legal Automated Army-Wide System Bulletin Board System (LAAWS BBS) as soon as available.

There is now a separate environmental law file area on the LAAWS BBS. Undoubtedly, this will please those users who are tired of sifting through message files for the information they need. Now, that information, including the Environmental Law Bulletin, is in the files area. All files are saved in Word Perfect 5.1 format. Our vision for the area is to use it as a mini-practice resource location where environmental law attorneys can read and download policy memos, information papers, and previous solutions to environmental problems. We also plan to include media specific lists of resources for practitioners. We encourage your input on resources you would like to see on-line, but always remember, this area is NOT a substitute for accurate, up-to-date research.

ELD soon expects to launch a web site of convenient environmental and general law links to be used as a springboard for on-line research. Also included in the site will be a listing of ELD personnel for e-mail contact.

DID YOU KNOW? . . . IT TAKES APPROXIMATELY 100 TIMES
MORE WATER TO PRODUCE A POUND OF BEEF THAN IT DOES TO PRODUCE A POUND OF WHEAT.

Dithiocarbamate Task Force v. EPA - MAJ Anderson-Lloyd

On 1 Nov 96, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the U.S. Environmental Protection Agency (USEPA) had acted arbitrarily and capriciously in listing certain carbamate compounds as hazardous waste under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901-6992k (1988). The petitioners, Dithiocarbamate Task Force (DTF), represented manufacturers who make or use four classes of carbamate compounds. The case
concerns the listing of certain derivatives of carbamic acid that are used as pesticides, herbicides,

and fungicides, as well as for various purposes used by the rubber, wood, and textile industries.

The USEPA proposed listing various carbamates as hazardous wastes under RCRA's implementing Regulations. Criteria for Listing Hazardous Waste, 40 C.F.R. §261.11 (1992). The regulations require USEPA to consider ten specified factors when determining whether a waste poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed, or otherwise managed. These factors include the nature, concentration, and toxicity of constituents, their potential for persistence and bioacculmulation, and "the plausible types of improper management to which the waste could be subjected." DTF challenged the listing determinations on a number of theories, one of which was USEPA's failure to consider each of the ten regulatory factors.

The court found that USEPA must consider each factor and that even a finding that a factor is unimportant or irrelevant would be subject to deferential review. In this case, however, USEPA did not consider each factor for each product listed. In addition, the court found that USEPA's consideration of the mismanagement factor was flawed. The court dismissed some of the "plausible mismanagement" scenarios that USEPA relied on in making the listing determination. The ruling specified that the Agency must provide some support for the conclusion that a particular mismanagement scenario is plausible. The USEPA should only consider those scenarios that may reasonably occur and result in probable harm.

It is unclear whether USEPA will appeal the ruling in DTF v. EPA. The court's decision will restrict the Agency's ability to list certain hazardous wastes. At the same time, the decision also lends support to USEPA's decision not to list some wastes as hazardous using the "plausible mismanagement" factor. Another approach would be for the Agency to allow the case to stand and rewrite the listing criteria to fit its current approach to listing determinations. It is clear that this case mandates careful consideration of the regulatory factors, in particular "plausible mismanagement" in future hazardous waste listing determinations by USEPA.

Required Agreements Between the Army and EPA for Army Facilities on the National Priorities List - MAJ Cook

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires Federal agencies with facilities on the national priority list (NPL) to enter into an interagency agreement (IAG) with the U.S. Environmental Protection Agency (USEPA) within 180 days after completion of the facility's Remedial Investigation/Feasibility Study (RI/FS). CERCLA, §120(e)(2), 42 U.S.C. §9620(e)(2) (1996). All such IAGs shall include public participation as set forth in CERCLA §117. CERCLA §117, 42 U.S.C. §9617 (1986). The IAG must include the following:

(1) A review of alternative remedial actions and the selection of a remedial action;
(2) A schedule for the completion of the remedial action; and,
(3) Arrangements for long-term operation and maintenance of the facility.

CERCLA, 42 U.S.C. § 9620(e)(4) (1996).

The USEPA and a Federal facility must enter into a Federal Facility Agreement (FFA), which is intended to serve as a procedural "blueprint" for the facility's cleanup, and to meet the requirements of CERCLA §120. At most installations, it is anticipated that FFAs will be entered into years before a record of decision (ROD) is signed. The ROD, an agreement between the Army and USEPA with concurrence by the effected state, addresses the specific requirements found in CERCLA §120(e)(4). Case law and USEPA guidance do not consider the RI/FS process complete until the ROD for an operable unit is signed. With respect to CERCLA §120 requirements, because

the FFA is signed before the ROD is completed, it will not analyze remedial alternatives or contain a detailed cleanup schedule, since these are two of the ROD's roles.

The FFA, however, can and should include how the ROD process will be completed, when the cleanup schedule will be attached to the ROD, and provisions for long-term operation and maintenance. By having a FFA in place before the ROD is completed, the ROD signing perfects CERCLA §120(e)(4) requirements. Therefore, the FFA, supplemented by the ROD, serves as the comprehensive CERCLA IAG between the USEPA and the Army at NPL sites.

DID YOU KNOW? . . . RED-COCKADED WOODPECKERS PREFER PLACING THEIR NESTING CAVITIES ON THE WESTERLY SIDE OF TREES.

Third Circuit Rules on Passive Migration - Ms. Fedel

The U.S. Court of Appeals for the Third Circuit recently held that passive migration of contamination released prior to a party's ownership of property does not constitute "disposal" during that party's tenure as owner for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). U.S. v. CDMG Realty Co., et al., 96 F.3d 706 (3rd Cir. 1996).

The current owner of the property, HMAT, was sued by the U.S. pursuant to CERCLA for the costs of the response action, and sought contribution on a passive migration theory from the company that had sold it the land, Dowel Associates. HMAT argued that disposal occurred because contamination that was released on the land prior to Dowel's purchase of the property spread during Dowel's ownership.

The court rejected this theory, holding that there had been no "disposal" during Dowel's ownership of the property and, therefore, Dowel did not fall within the definition of a responsible party. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994). The court based its ruling on the plain language of CERCLA's definition of "disposal," as well as on the structure of the statute's liability scheme.

The court rejected several rulings by other jurisdictions that have held that passive migration can constitute disposal, including one from the U.S. Court of Appeals for the Fourth Circuit. *See* U.S. v. Waste Idus., Inc., 734 F.2d 159, 164-65 (4th Cir. 1984). The court found that the words "leaking" and "spilling," by their definitions, require some active human conduct. Even if they did not, however, the court found that neither word denotes the gradual spreading of contamination that was alleged by HMAT. Moreover, the court found that the passive migration theory would create a complicated way of making liable all people who owned or operated facilities after the introduction of hazardous substances, an intent that the court was not willing to impute to Congress.

District of Columbia Circuit Invalidates Aggregation Policy - Ms. Fedel

The U.S. Court of Appeals for the District of Columbia Circuit recently invalidated a U.S. Environmental Protection Agency (USEPA) policy on aggregating sites for listing on the national priorities list (NPL). Mead Corp. v. Browner, 100 F.3d 152 (D.C.Cir. 1996). The USEPA policy provided for listing noncontiguous facilities on the NPL as a single site on the basis of such factors as whether the two areas were part of the same operation (historically), whether the potentially responsible parties were the same or similar entities, whether the target population was the same

or overlapping, and the distance between the noncontiguous areas. Aggregation Policy, 48 Fed. Reg. 40,663 (1983).

The court held that the policy, as used to justify the listing of noncontiguous sites whose listing cannot be individually justified by reference to risk criteria, is unlawful because USEPA lacks statutory authority to list sites in this manner. The court found that inclusion of low-risk sites on the NPL would be contrary to Congress' intent in creating the NPL, namely to create a system of prioritizing sites for response based on risk levels.

The court rejected USEPA's argument that its authority in the liability section of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was broad enough to encompass the aggregation policy. CERCLA §104(d)(4), 42 U.S.C. §9604(d)(4), (1992). The court held that §104(d)(4) authority, which allows USEPA to treat noncontiguous facilities that are reasonably related on the basis of geography or risk as one facility for the purposes of liability, did not affect USEPA's listing authority in §105. CERCLA §105, 42 U.S.C. §9605 (1986). Nor does USEPA's ability to group separate facilities together on the NPL for response priority purposes include those sites that do not qualify as priority sites. CERCLA §105(a)(8)(B), 42 U.S.C. §9605(a)(8)(B) (1986).

The court restated also its previous recognition of the harmful effect that the status of being ranked on the NPL has on business entities. In doing so, the court rejected USEPA's argument that Mead Corporation's ranking on the NPL would have no effect on Mead's liability for the low-risk site because the NPL is merely a response planning tool.